IN THE SUPREME COURT OF MISSOURI

In the Interest of	§	
	§	Supreme Court No.
R.B., a male juvenile,	§	SC86979

SUBSTITUTE AMICUS CURIAE BRIEF OF JUSTICE FOR CHILDREN

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Friend of the Court, Justice for Children, adopts the Statement of Jurisdiction and Facts as presented in Appellant's Brief.

III. POINTS RELIED ON

A. The trial court erred in denying admission of the child victim's statements under *Crawford v. Washington* because *Crawford* does not apply to child victims' statements.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666, (1990).

B. The trial court erred by failing to recognize that the child victim's statements are admissible under *White v. Illinois*, which, along with an entire jurisprudential scheme protecting children, survives *Crawford*.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980).

People v. Huddleston, 816 N.E.2d 322, 339 (Ill. 2004).

C. Even if Crawford applied, the court erred in its application to the facts because the child's statements were not testimonial and the court failed to determine whether a reasonable person in the child's circumstances would have believed the statements would be made available for trial.

People v. Sharp, No. 04CA0619, 2005 WL 2877807 (Colo. Ct. App. Nov. 3, 2005)

Colorado v. Vigil, No. 04SC532, 2006 WL 156987 (Colo. Jan. 23, 2006)

IV. ARGUMENT

A. *Crawford v. Washington* does not apply to child victims' statements.

In 2004 the Supreme Court barred out-of-court testimonial statements as unconstitutional under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A close analysis of *Crawford* reveals that it is inapplicable to decisions pertaining to child victims' out-of-court statements, and is not meant to disturb that line of authority. As the Court noted in *Maryland v. Craig*, the Confrontation Clause must be interpreted "in a manner sensitive to its purpose." 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed. 2d 666, 681 (1990).

1. ***Crawford* is factually distinct from the case at hand.**

Crawford concerned the out-of-court statements of the defendant's adult wife, who witnessed the defendant stabbing another adult, and who was unavailable to testify due to marital privilege. The present case is distinguishable in three crucial ways: the witness is a child, the crime is the sexual abuse of the child, and the child's unavailability is due to significant emotional and/or psychological trauma. While the jurisprudential history cited in *Crawford* understandably assures an adult the opportunity to physically confront another adult who testifies against him or her, it cannot be applied so broadly as to ignore the distinct jurisprudential history protecting child victims. Applying *Crawford* to child victims is illogical and unjust: It fails to protect the youngest, most severely traumatized victims who are psychologically unable to endure cross-examination and

allows for the successful prosecution only of those defendants who choose as victims older children who are more mature and psychologically fit.

The *Crawford* opinion is limited to adult witnesses. It does not touch or concern child victim testimony and is thus inapplicable to this case. Indeed, to extend *Crawford* to exclude a child victim's testimony, this Court must abandon *stare decisis*.

B. Child victim witness statements are analyzed under distinct jurisprudence.

1. *Crawford did not overrule White v. Illinois*

The child victim's statements in the present case are admissible under *White v. Illinois*, *Ohio v. Roberts* and their progeny. *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980). In his *Crawford* opinion, Justice Scalia expressly recognized the Supreme Court's earlier decision in *White* as being "in tension" with *Crawford*, but declined to overturn *White*. *Crawford*, 541 U.S. at 58-59 & n.8, 124 S. Ct. at 1368-69 & n.8. In *White*, the Court allowed admission of a child victim's statements to an investigating police officer despite the child's unavailability and the defendant's lack of an opportunity to cross-examine. *White v. Illinois*, 502 U.S. at 349-51, 112 S.Ct. at 739-40. In *White*, the child victim's statements were admitted as spontaneous declarations and medical examination hearsay exceptions. *Id.* Lest the reader of *Crawford* be misguided by that factual distinction, however, Justice Scalia explicitly reminded us that the only legal question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the child victim. *Crawford*, 541 U.S. at 58 n.8, 124 S. Ct. at 1368 n.8. It did not. *Id.*

Before *White*, the Supreme Court made clear that Confrontation Clause scrutiny generally required a showing of: (1) unavailability; and (2) adequate indicia of the hearsay statement's reliability under *Roberts*. *See Roberts*, 448 U.S. at 66, 100 S. Ct. at 2539. *White* set forth the child victim's exception, which nullified the unavailability element.

White controls here. *Crawford* speaks only to adult witnesses; *White* speaks to child victim witnesses. *Crawford* leaves intact the *White* case's allowance for the admission of child victim statements. What the Supreme Court has chosen not to disturb in its *Crawford* analysis, this Court should not disturb.

2. *When Crawford does not apply, States apply Roberts-appropriate rules.*

Crawford has already told us the standards that apply to hearsay statements that *Crawford* does not bar. For example, *Crawford* barred statements that are *testimonial* in nature. Statements that are not testimonial are either: (1) *not* subject to Confrontation Clause scrutiny at all; or (2) are subject to the standards set forth in *White*, *Roberts* and their progeny. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." 541 U.S. at 68, 124 S. Ct. at 1374.

Accordingly, the child victim's statements at issue here are admissible either because they are free from Confrontation Clause scrutiny (whether in criminal court or

juvenile proceedings)[1] or because the statements are otherwise admissible under state statutes that are consistent with *White* and *Roberts*.

Under *White* and *Roberts*, a child victim's hearsay statements are admissible when there are adequate indicia of the statements' reliability. *White*, 502 U.S. at 348-49 & 356, 112 S. Ct. at 739 & 743; *Roberts*, 448 U.S. at 65, 100 S. Ct. at 2538-39. States are free to develop hearsay rules consistent with Confrontation Clause scrutiny. *See Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. The child victim's statements in this case were sought to be introduced under a Missouri statute that was drafted not only to incorporate the indicia of reliability required under *White* and *Roberts*, but also to address states' legitimate rights in protecting children. *See Missouri v. Wright*, 751 S.W.2d 48, 52 (Mo. banc 1988) (upholding the constitutionality of Missouri Revised Statute § 491.075 under *Roberts* because it requires a showing that the "'time, content, and circumstances of the statement provide sufficient indicia of reliability'"). The trial court simply erred in determining that *Crawford* applied to child victims' statements and by failing to determine the admissibility of the statements under the statute.

i. *The Confrontation Clause bends to protect child victim witnesses.*

[1] Appellant's Amended Brief addresses admissibility of child victim witness statements in juvenile proceedings, rather than criminal court.

A separate body of Confrontation Clause jurisprudence pertains to child victims.[2] The Supreme Court has consistently held that the Confrontation Clause is not absolute especially in relation to child victim witnesses. *See Maryland v. Craig*, 497 U.S. 836, 844 (1990) (finding confrontation clause did not prohibit child witness in child abuse case from testifying by one-way closed circuit television.) In her concurring opinion in *Coy v. Iowa*, a decision cited in *Crawford* that involved *in court* child victim testimony, Justice O'Connor allows for a particular trial procedure other than face-to-face confrontation if "necessary to further an important public policy . . . [t]he protection of child witnesses is, in my view, and in the view of a substantial majority of the States, just such a policy." *Coy v. Iowa*, 487 U.S. 1012, 1025, 108 S.Ct. 2798, 2805, 101 L.Ed.2d 857, 869-70 (1988). The "strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* Two years later, the Court restated the public policy argument, noting that the Confrontation Clause reflected only a *preference* for face-to-face confrontation, "a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (citations omitted).

The Supreme Court has consistently recognized a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment." *Id*. at

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[2] *Crawford* suggests that child victims' statements might not be subject to the Confrontation Clause. Regardless, we address here the possibility that the *White* and *Roberts* analysis applies.

852. Further, the government has an strong interest in protecting children from sexual abuse. *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *see also Prince v. Mass.*, 321 U.S. 158, 168 (1994) ("a democratic society rests … upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies"); *People v. Huddleston*, 816 N.E.2d 322, 339 (Ill. 2004) ("Beyond the compassion one must feel for these innocent victims [of child sexual abuse], pragmatism dictates a recognition that the victim's problems are likely to become society's problems … [including] substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness").

ii. *Missouri and other states have "tender years" hearsay statutes.*

Missouri has long recognized the distinction between children and adults and has developed a statutory and common law jurisprudential scheme that treats children, and particularly child victim witnesses, differently. *See* MO. REV. STAT. § 491.075 *et seq*. (2000). The Missouri statute provides that statements made by a child under the age of fourteen relating to certain enumerated offenses are admissible if the circumstances of the statement provide sufficient indicia of reliability and the child is physically unavailable because of the significant emotional or psychological trauma that would result from testifying. *Id.* As the Supreme Court of Missouri opined in its decision upholding the statute in a Confrontation Clause attack:

> [T]he state has a strong interest in protecting children, and child abuse presents unusual evidentiary problems because the victim's testimony is often the only direct evidence linking the accused to the crime. [The statute] reflects a policy determination that in some child abuse cases the victim's out-of-court statements may possess sufficient probative value to contribute to the judicative process; indeed, such statements may on occasion be *more* reliable than the child's testimony at trial, which may suffer distortion by the trauma of the courtroom setting or become contaminated by contacts and influences prior to trial. The defendant has failed to carry his burden of demonstrating that . . . the statute is not rationally related to a legitimate governmental interest.

Missouri v. Wright, 751 S.W.2d 48, 52 (Mo. banc 1988). Missouri's statute meets constitutional muster by requiring proof that the "time, content, and circumstances of the statement provide sufficient indicia of reliability" under *Roberts* and *White*. *Id.*

Many states have adopted similar "tender years" statutes.[3] If this Court decides that the Confrontation Clause prohibits the admission of videotaped child-victim

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[3] *E.g.* Ala. Code §15-25-32 (2003); Colo. Rev. Stat. Ann. § 13-25-129 (2003); Iowa Code Ann § 232.96 (2003); N. H. Rev. Stat. Ann. § 516:25a (2003); Okla. Stat. Ann. tit. 12 § 2803.1 (2003); R.I. Gen. Laws § 14-1-69 (2003); Utah Code Ann. § 76-5-411 (2003); N.Y. Fam. Ct. Act. § 1046 (2003).

testimony, it will not only overturn precedent, but will strike a vicious blow to the prosecution of child abuse in Missouri. The most vulnerable victims and the most heinous perpetrators will be the most affected by this ruling. In effect, under such a rule, abusers who prey upon and terrorize the exceptionally vulnerable will escape the consequences of their crimes and be free to victimize countless others. This Court should not abandon the established precedent that protects innocent child victims.

C. Respondent cites inapplicable nonbinding cases.

Respondent cites nonbinding decisions from other jurisdictions for the argument that the forensic interview is testimonial. *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *State v. Mack*, 101 P.3d 349 (Or. 2004); *People v. Sisavath*, 13 Cal. Rptr. 3d 419 (Cal. App. 2004). The cases cited by Respondent have a common fatal flaw: Each fails to address the question of whether *White* survived *Crawford*, and thus, fails to analyze the facts under existing jurisprudence unique to child victim statements. *See generally United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004), *rev'd on other grounds*, --- P.3d ---, No. 04SC532, 2006 WL 156987 (Colo. 2006); *State v. Mack*, 101 P.3d 349 (Or. 2004); *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004). *People ex rel R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004); *People v. Sisavath*, 118 Cal. App. 4th 1396 (Cal. Ct. App. 2004). Flawed, nonbinding cases should not topple established Supreme Court precedent. As has been found by this Court, juvenile systems operate under a distinct jurisprudential scheme. *See Appellant's Amended Brief.*

D. The videotape is still admissible under *Crawford*.

1. *The videotape is not "testimonial."*

Even if *Crawford* applied (which it does not), the *Crawford* opinion expressly applies only to "testimonial" evidence, but "leave[s] for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court explained that prior testimony at a preliminary hearing or before a grand jury is *per se* testimonial, but those circumstances are irrelevant here. The Court also explained that police interrogations are *per se* testimony. Otherwise, the Court was less clear as to what statements constitute "testimony." The statement in question here is the videotaped explanations of a *child victim* of sexual abuse, to a forensic examiner at a child advocacy center. This type of statement does not constitute testimony as envisioned by the Supreme Court in *Crawford.*

i. *The statement is not part of a police interrogation.*

The *Crawford* Court specifically refused to decide whether the child victim's statements to a police investigator, admitted in *White*, come within the definition of "testimonial" evidence. *Crawford*, 124 S. Ct. at 1370. Yet, in discussing *White,* the Court carefully refers to "statements of a child victim to an investigating police officer," as opposed to "police interrogations," which it considers *per se* testimony. The Court's carefully worded analysis suggests a clear intention to exclude any statements of child victims, and particularly statements made to investigators at child advocacy centers, from the definition of testimony.

Videotaped interviews by forensic examiners at child assessment centers have been admitted as non-testimonial. *People v. Sharp*, 2005 WL 2877807 (Colo. App. Div.

V., Nov. 3, 2005).[4] The forensic examiner's role as a member of a child protection team does not, alone, make her a government official. *See Colorado v. Vigil*, --- P.3d at ---; No. 04SC532, 2006 WL 156987, at *6 (Colo., Jan. 23, 2006) (finding a victim's statements to a doctor were non-testimonial). More than a tangential relationship to law enforcement is required to constitute a "police interrogation." Interrogations arise from direct and controlling police activity. *See id*. Rather than acting purely for law enforcement, forensic examiners at child assessment centers can, and do, work to address the best interest of the child—mentally, emotionally and physically. Indeed, the forensic interviewer in this case holds a bachelor's degree in psychology and a master's degree in professional counseling. (Record at pp.7-8.) The trial court erroneously refused to admit the testimony without reviewing it, and thus, had no opportunity to consider whether the statements were made for purposes such as psychological treatment or diagnosis, rather than prosecution.

ii. *The objective child standard would apply to any Crawford analysis.*

In addition to the *per se* testimony of a police interrogation, the Supreme Court delineated three types of statements that might qualify as testimonial:

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[4] In *Vigil*, the Colorado Supreme Court directly adopts the objective witness test set forth in *Sharp*. Id. at *8. This finding directly distinguishes *People ex rel R.A.S.*, a case pointed to by Appellee as supporting the proposition that the forensic examiner interview constitutes testimony. *See People ex rel R.A.S.*, 111 P.3d 487 (Colo. Ct. App. (IV), 2004).

1) ex parte in-court testimony or its functional equivalent-material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorally;
2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions; and
3) statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

See Crawford, 541 U.S. at 51-52, 124 S. Ct. at 1364.

A child victim's videotaped statement to a forensic examiner at a child assessment center does not fall under the first two of the courts formulations of "testimonial." If *Crawford* applied (which it does not), the question for this Court, then should be *whether the statement was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*. *See, e.g., Vigil*, 2006 WL at *8. More specifically, "the test in determining whether the child's statement is testimonial depends on *whether an objective person in the child's position* would believe her statements would lead to punishment of defendant." *Id*. (adopting the test articulated in *Sharp*, 2005 WL 2877807, at *5). The objective child's position is determined by analyzing the circumstances, including the child's age, whether the child was aware of government involvement and whether an objectively reasonable child would be aware that the defendant faces the possibility of criminal punishment. *Id*.

at *8. The child in this case was ten years old at the time of the forensic interview. Regardless, the trial court never analyzed the circumstances of the interview. It denied admission without reviewing the videotape. As a result, the court could not have determined whether the child's statements were testimonial under *Crawford* analysis.

V. CONCLUSION

Recognizing a need to protect society's most helpless victims, courts have long upheld legal distinctions for child-victim witnesses. *Crawford* is no exception. It does not and should not apply to the out-of-court videotaped statements of a child abuse victim. For this Court to hold otherwise is to thwart well-settled statutory and common law Confrontation Clause protection for children. The court failed to analyze the victim's statements under established Confrontation Clause jurisprudence specific to child victim statements, including the Missouri tender years statute at issue. As such, the trial court erred in suppressing the videotaped testimony of A.G., and its order should be reversed.

VI. CERTIFICATE OF SERVICE

I, Dulcie Green Wink, certify that both a printed and electronic copy of the foregoing pleading has this day been served on the below referenced counsel via certified mail, return receipt requested in accordance with Supreme Court Rules of Appellate Procedure 20.04, 30.07. 84.07 and 84.06(g) on this the 26th day of January, 2006:

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VII. CERTIFICATE REGARDING VIRUS SCAN OF COMPUTER DISKETTE

I, Dulcie Green Wink, certify that the computer diskette containing the Amicus Curiae Brief of Justice for Children was scanned for viruses and found to be virus free.

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Dulcie Green Wink

VIII. CERTIFICATE OF COMPLIANCE

I, Dulcie Green Wink, certify that this Amicus Curiae brief for Justice for Children complies with the Supreme Court Rule of Appellate Procedure 55.03, 84.06(b), and Local Rule 360.

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